SUPREME COURT U. S.

DEC 6 1968

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 812

HERBERT DONALD HILL,
Petitioner,

vs.

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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Herbert Donald Hill, Petitioner prays that a writ of certiorari be issued to review the judgment of the Court of Criminal Appeals of the State of Oklahoma entered in the above entitled case on the 17 day of July, 1968.

OPINION BELOW

The opinion of the Court of Criminal Appeals for Oklahoma is unreported as yet and is reproduced in the Appendix to the Petition. (Appendix A)

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on the 17 day of July, 1968. (R. 180) First hearing was denied on the 31st day of July, 1968 (R. 183) and Second Rehearing was denied September 11, 1968. (R. 185) The jurisdiction of this Court is invoked under U.S.C.A. Sec. 1257(3) and Rule 19 of this Court.

QUESTIONS PRESENTED

(1) Does a lawyer who does not make a record of the argument of counsel, empanelling of the jury and files no briefs on appeal nor on Petition for Rehearing constitute sufficient legal representation so that the Defendant has had "due process?"

(2) Where the facts do not justify conviction on the charges as set forth in the complaint and the jury verdict is based on complete lack of facts, has Defendant been denied "due process" of law.

STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States in pertinent part:

"Section One. Due Process of Law. * * *

"Nor shall any state deprive any person of life, liberty or property without due process of law . . ."

REASONS FOR GRANTING WRIT

THE CHARGES WERE NOT PROVEN AND THE ATTORNEY HANDLING THE SAME DID NOT PRESENT ANYTHING ON APPEAL, NOT EVEN THE FILING OF A BRIEF OR THE MAKING OF AN APPEARANCE.

Certiorari should be granted for the reason that the District Attorney did not prove or introduce evidence which proved the charge. Thus, the appellant is entitled to a dismissal and reversal.

Petitioner submits that the Defendant Herbert Donald Hill has not been properly represented before the Court of Criminal Appeals and he has been deprived of his Constitutional rights guaranteed him by the Constitution of the United States especially the Fourteenth Amendment thereof.

For the following reasons:

(1) The attorney who handled this appeal never filed a brief in support of the Petition in Error in the matter and in the First and Second Petitions for Rehearing made only a general statement of one page in length rather than pointing out the specific error in the Casemade and made no issue before the appeals court. (R. 180, 185)

(2) The record which was made by Defendant's counsel at the trial does not show the examination of jurors, does not show the argument of counsel, does not show the opening or closing statement, does not show anything upon which an appeal could be made except the actual testimony itself.

(3) That the record shows that there was a conviction without any sufficient evidence.

(a) The evidence shows that Douglas J. Neely who worked for the State Plate Glass Company at 1402 N. Eastern, had in his cash drawer that morning, (2) $20.00 bills, (1) $10.00 bill and (1) $5.00 bill along with miscellaneous monies, none of which could be identified (R. 59) and he was not sure of the amount of money taken or left. (R. 37).

(b) That he went to the back of the store (R. 45) to wait on people who came in many times during the morning, that he had several customers during that morning and that he did not see anyone open the cash drawer (R. 35) and only after the Defendant Herbert Donald Hill left his place of business did he notice for the first time that some of the money was gone. (R. 61)

(c) Anyone at anytime during the morning could have opened the door (R. 46) come in, withdrawn the money from the cash drawer and left without the owner of business having any idea who did it (R. 41).

(d) Later on that evening the Police stopped a car with a woman only in the car and arrested her for a traffic violation and that after she was taken to the jail and searched by the matron, that they found in her panties, (2) $20.00 bills, (1) $10.00 bill and a $5.00 bill (R. 74). There is *no testimony* that this is the same money or connected with this loss at all. (R. 76)

(e) The money which was removed from the panties of Selma Joe McIntosh was not marked, (R. 77) and she was not at any time seen with the Defendant Herbert Donald Hill (R. 47) other than the fact that she was driving a black and yellow Chevrolet with Tag Number 2228 (R. 84) and Hill had gotten into such a car.

(f) There was no confession, nor statement of any sort introduced.

(4) The record does show affirmatively, although not a part of the evidence before the jury, that the Defendant was offered only "one year" if he would plead guilty (R. 140) and his counsel refused the one year plea and yet the jury gave him seven and one-half years.

The record clearly shows that the Defendant was not properly represented.

In *Brinegar v. United States*, 338 U.S. 160, 93 L. Ed. 1879, the court said at page 1889:

> "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition and to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard."

Thus, since there was no proof on the charges upon which a conviction is based then the Defendant (Petitioner) has been deprived of "due process."

In *Beal v. United States*, 32 F. 2d 1002, and in *Edwards v. United States*, 7 F. 2d 357, the court held where evidence in a case is as consistent with innocence as with guilt, a conviction cannot be sustained. The evidence must exclude every other hypothesis but that of guilt.

In *Lunce v. Overlade*, 244 F. 2d 108, the Circuit Court said:

> "However, where the representation of an accused by his counsel is so lacking in diligence and competence that the accused is without representation and the trial is reduced to a sham, it is the duty of the State to see that the essential rights of the accused are preserved by appropriate intervention. United States ex rel. Darcey v. Handy, 346 U.S. 865, 98 L. Ed. 375; United States ex rel. Feeley v. Ragen, (7 Cir.) 166 F. 2d 976."

CONCLUSION

For the reasons above stated, Petitioner respectfully suggests that a Writ of Certiorari be issued to review the judgment of the Court of Criminal Appeals of the State of Oklahoma.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

Filed in Court of Criminal Appeals, State of Oklahoma, July 17, 1968. Andy Payne, Clerk.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. A-14738

HERBERT DONALD HILL, Plaintiff in Error,

vs.

THE STATE OF OKLAHOMA, Defendant in Error.

S Y L L A B U S

1. Where the defendant appeals from a judgment of conviction and no briefs are filed in support of the petition in error, this Court will examine the records only for fundamental error. If none appears of record, the judgment will be affirmed.

2. The record in the instant case does not reveal any fundamental error, and the evidence is sufficient to support the verdict.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BOSTON W. SMITH, JUDGE.

Herbert Donald Hill was convicted of the crime of Grand Larency,

After Former Conviction of a Felony, and appeals.

AFFIRMED

Red Ivy, Chickasha, Oklahoma
Attorney for Plaintiff in Error

G. T. Blankenship, Attorney General
Attorney for Defendant in Error.

OPINION BY NIX, P.J.,
TOM BRETT, J. CONCURS.

NIX, PRESIDING JUDGE:

Plaintiff in Error, Herbert Donald Hill, hereinafter referred to as the defendant, was charged by information in the District Court of Oklahoma County, Oklahoma with the crime of Grand Laceny, After Former Conviction of a Felony. He was tried by a jury, found guilty, and his punishment assessed as Seven and one-half years in the penitentiary.

His appeal was lodged in this Court on April 24, 1968; with a brief due by May 24, 1968. No brief was ever filed, nor extension of time requested. Therefore, on June 28, 1968, the cause was summarily submitted for opinion in accordance with Rules 6 and 9 of the Court of Criminal Appeals.

This Court has consistently and repeatedly held, as in the case of Ashby v. State, Okl. Cr., 406 P. 2d 1907:

> "Where the defendant appeals from a judgment of conviction and no briefs are filed in support of the petition in error, this Court will examine the records only for fundamental error. If none appears of record, the judgment will be affirmed."

This Court has carefully examined the record and reviewed the testimony in the instant case, and find no fundamental error. The evidence is more than sufficient to support the verdict of the jury.

The judgment and sentence of the trial court is hereby AFFIRMED.

Tom Brett, J., concurs.